

Alves v Marchiafava

2013 NY Slip Op 30191(U)

January 29, 2013

Sup Ct, Queens County

Docket Number: 6395/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

FILIPPE G. ALVES, Index No.: 6395/2010
Plaintiff, Motion Date: 12/13/12

- against - Motion No.: 2

WALTER J. MARCHIAFAVA, Motion Seq.: 2
Defendant.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by defendant, WALTER J. MARCHIAFAVA, for an order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits.....	8 - 12
Reply Affirmation.....	13 - 15

This is a personal injury action in which plaintiff, Felipe G. Alves, age 46, a laborer with Tully Construction Company seeks to recover damages for injuries he allegedly sustained on February 20, 2009, as a result of a motor vehicle accident that occurred when his vehicle, while making a left turn, was struck in the driver's side by the vehicle owned and operated by the defendant Walter J. Marchiafava. The impact which caused the plaintiff's vehicle to turn onto its side, took place on Old Rockaway Boulevard at the intersection with North Boundary Road, Queens County, New York.

Defendant, now moves for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance

Law. In support of the motion, the defendant submits an affirmation from counsel, Tracy Morgan, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; a copy of the medical report of orthopedist Dr. Salvatore Corso and color photographs depicting scarring of the plaintiff's head/scalp.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained a deep scalp laceration requiring sutures and causing scarring of scalp as well as disc herniation at T11-12, cerebral concussion and post concussion syndrome. Plaintiff states that he was confined to bed and home for two weeks intermittently following the accident and was partially incapacitated from employment for three months intermittently following the accident. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff was examined on August 18, 2011 by orthopedist, Dr. Salvatore Corso, a physician retained by the defendant. Plaintiff reported to Dr. Corso prior to the examination that on February 20, 2009, he sustained injuries to his neck, lower back and bilateral hips. On the date of the examination he presented with complaints of neck and lower back pain. Dr. Corso performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the plaintiff's cervical spine, thoracolumbar spine, right hip and left hip. Dr. Corso's impression was that the plaintiff was status post cervical and lumbar strain and status post bilateral hip sprain. He states that he defers comment on head scarring to the appropriate specialty. He states, however, that based upon his objective physical evaluation there is no evidence of an orthopedic disability.

In his examination before trial taken on July 12, 2011, the plaintiff states that he presently works 40 hours per week as a construction worker. The impact caused his head and left side to hit against car door and caused a laceration on his scalp that was bleeding. He left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital. In the emergency room he was given six stitches to close the wound on his scalp and then he was discharged the same day. Subsequently, he received physical therapy for two months for injuries to his back. He suffers from dizziness and feels pain in his head and back on a daily basis. He stated that he returned to work two weeks after the accident.

Defendants' counsel contends that the affirmed medical reports of Dr. Corso, the photographs of the plaintiff's scalp, as well as the EBT testimony of the plaintiff, stating that he returned to work two weeks immediately following the accident, are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who returned to work after two weeks did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities. In addition counsel contends that the photographs of the plaintiff's scalp show that the scar from the laceration is either minor or not visible and is obscured by hair and therefore is not a significant disfigurement constituting a serious injury pursuant to the Insurance Law.

In opposition, plaintiff's attorney, Dennis S. Matarangas, Esq., submits an affirmed medical report from the plaintiff's treating physician, Dr. Juraj Kubis and an affidavit from the plaintiff dated December 6, 2012. In his affidavit, the plaintiff states that as a result of the accident he suffered a deep scalp laceration requiring sutures, scarring of the scalp, disc herniation at T11-12. He states that he was treated by Dr. Kubis immediately following the accident and remains under his care to date. He states that he continues to suffer from headaches and constant pain in his left hip and back.

Dr. Kubis states in his affirmation that he first examined the plaintiff on April 23, 2009, two months after his accident of February 20, 2009. At that time he presented with pain in the left hip, neck pain and low back pain. He states that Mr. Alves also had a scar from the deep laceration. He states that the MRI indicated a disc bulge at T11-T12. At the time of the initial evaluation the doctor felt that the plaintiff sustained cervical radiculopathy left hip derangement and acute lumbar and cervical spine as a result of the accident. He underwent several months of physical therapy which did not alleviate his symptoms. Dr. Kubis re-examined the plaintiff on September 18, 2012 because the plaintiff was still experiencing pain and limitation of range of motion of the left hip, neck and lower back. Upon his clinical evaluation, Dr. Kubis found that the plaintiff had significant limitations of range of motion of the left hip, lumbar spine, and cervical spine. He states that in his opinion plaintiff suffered a permanent partial disability and permanent consequential limitation of use of his left hip, lumbar spine and cervical

spine as a result of the subject accident. Dr Kubis also states that the scar on plaintiff's head is still present and constitutes a permanent disfigurement.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition, and defendant's reply thereto, this court finds that the admissible evidence submitted by the defendant fails to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. In his bill of particulars, the plaintiff set forth the allegation that in addition to suffering a herniated or bulging disc in his thoracic spine, he also sustained a scalp laceration requiring sutures which left a disfiguring scar. In order to make a prima facie showing that the scar does not constitute a significant disfigurement the defendant submitted color photographs purporting to be the plaintiff's scalp area. However, the color photographs submitted by the defendant purporting to depict the scarring on the defendant's scalp are not in admissible form and moreover, are highly magnified, unclear and not dispositive as to the actual size, location or whether the scar is completely obscured by the defendant's hair. As such this court does not find that the photographs are sufficient to provide a clear enough record of their appearance to determine

whether the purported scar is significantly disfiguring or to demonstrate, prima facie, as a matter of law that the scar is not unattractive or objectionable or significant (see Azevedo v Platform Taxi Serv., Inc., 84 AD3d 847 [2d Dept. 2011]; Lewis v General Electric Co., 145 AD2d 728 [3rd Dept. 1988]; Rulison v Zanella, 119 D2d 95 [2d Dept. 1986]). Further, Dr. Corso, defendant's examining physician, stated that he deferred comment on head scarring to the appropriate specialty.

Inasmuch as the defendants did not meet their prima facie burden, it is unnecessary to consider the sufficiency of the plaintiff's papers in opposition (see Delayhaye v Caledonia Limo & Car Serv., Inc., 61 AD3d 814 [2d Dept. 2009]; Yong Deok Lee v Singh, 56 AD3d 662 [2d Dept. 2008]; Ali v Rivera, 52 AD3d 445 [2d Dept. 2008]).

Accordingly, based on the foregoing, it is hereby

ORDERED that the motion by the defendants for summary judgment dismissing the plaintiff's complaint is denied.

Dated: Long Island City, N.Y.
January 29, 2013

ROBERT J. MCDONALD, J.S.C.